Kong Ming Bank Bhd v Lau Pang Thang & Ors

HIGH COURT (KUCHING) — CIVIL SUIT NO KG 72 OF 1988
ABDUL KADIR SULAIMAN J
6 OCTOBER 1994

Civil Procedure *— Interest — Judgment debt — Default judgment carrying interest in excess of statutory rate of 8%pa — Whether permissible — Application to set aside default judgment — Courts of Judicature Act 1964 s 16(i) — Rules of the High Court 1980 O 42 r 12*

Civil Procedure *— Interest — Contractual interest — Agreement on post-judgment interest in excess of statutory rate — Whether independent covenant — Whether merged with judgment debt*

The plaintiff granted certain credit facilities to Dai Jai Enterprises Sdn Bhd ('Dai') for which the defendants executed a letter of guarantee. When Dai defaulted, the plaintiff issued letters of demand to the defendants. Subsequently, the plaintiff entered judgments in default of appearance against the first and third defendants at an interest of 12.25%pa from the date of judgment to the date of payment. The first and third defendants, by way of summons-in-chambers, succeeded in setting aside the judgment in default on the grounds that it had not been regularly obtained in that it purported to award a rate of interest in excess of the 8%pa limit provided in O 42 r 12 of the Rules of the High Court 1980 ('the RHC') and s 16(i) of the Courts of Judicature Act 1964 ('the Act'). The plaintiff appealed against the decision, claiming that the parties had agreed that post-judgment interest be at 12.25%pa. In this appeal, the court had to consider whether there was an agreement between the parties to pay post-judgment interest of more than 8%pa and, if there was, whether the agreement was an independent covenant which did not merge with the judgment.

Held, dismissing the appeal:

(1) A post-judgment interest rate which is in excess of the statutory minimum provided for by O 42 r 12 of the RHC and s16(i) of the Act is illegal and would entitle the court to set aside the judgment ex debito justitiae unless the plaintiff can prove that it is entitled to a higher interest rate.

(2) In order to penalize the defendant into paying more than the statutory rate of interest after judgment, the plaintiff must expressly state so in the agreement, which must be construed strictly. In this case, the provision on interest was far too vague to amount to an agreement on post-judgment interest. Therefore, the defendants were entitled as of right to set aside the default judgments as being illegal.

Obiter:

Even if there was an agreement on a higher rate of post-judgment interest, it did not amount to an independent covenant since the clause relied on by the plaintiff had not been phrased with sufficient clarity. Therefore, the agreement would have merged with the judgment so that only the statutory rate of interest was payable.

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan kredit tertentu kepada Dai Jai Enterprises Sdn Bhd ('Dai') dan defendan telah menyempurnakan sepucuk surat jaminan. Apabila Dai mungkir, plaintif telah mengeluarkan surat tuntutan kepada defendan. Seterusnya, plaintif mendapatkan penghakiman ingkar terhadap defendan pertama dan ketiga dengan kadar faedah sebanyak 12.25% setahun dari tarikh penghakiman hingga tarikh pembayaran. Defendan pertama dan ketiga, melalui saman dalam kamar, berjaya mengetepikan penghakiman ingkar tersebut atas alasan ianya diperolehi secara luar aturan memandangkan ia memberikan faedah pada kadar yang melebihi had 8% setahun yang diperuntukkan di bawah A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan s 16(i) Akta Mahkamah Kehakiman 1964 ('Akta itu'). Plaintif membuat rayuan terhadap keputusan itu dengan mendakwa bahawa pihak-pihak yang terlibat telah bersetuju bahawa faedah lepas penghakiman ditetapkan pada kadar 12.25% setahun. Dalam rayuan ini, mahkamah terpaksa memutuskan sama ada terdapat persetujuan di antara pihak untuk membayar faedah lepas penghakiman pada kadar yang melebihi 8% setahun dan, sekiranya ada, sama ada persetujuan itu adalah suatu waad yang berasingan yang tidak bercantum dengan penghakiman itu.

Diputuskan, menolak rayuan itu:

(1) Sesuatu kadar faedah lepas penghakiman yang melebihi kadar minima statutori yang diperuntukkan oleh A 42 k 12 KMT dan s 16(i) Akta itu menyalahi undang-undang dan mahkamah berhak mengetepikan penghakiman itu ex debito justitiae melainkan jika plaintif boleh membuktikan bahawa ia berhak mendapat kadar faedah yang lebih tinggi itu.

(2) Untuk mendenda defendan supaya membayar faedah lebih daripada kadar statutori lepas penghakiman, plaintif perlu menyatakan sedemikian dengan jelas di dalam persetujuan itu, yang mana harus ditafsirkan secara tegas. Di dalam kes ini, peruntukan mengenai faedah tidak cukup jelas untuk merupakan suatu perjanjian mengenai kadar faedah lepas penghakiman. Oleh itu, defendan berhak mengetepikan penghakiman ingkar itu kerana ia menyalahi undang-undang.

Obiter:

Walau sekalipun boleh dikatakan bahawa terdapat satu persetujuan untuk kadar faedah lepas penghakiman yang lebih tinggi, ia tidak merupakan satu waad berasingan memandangkan fasal yang diharapkan oleh plaintif tidak diungkapkan dengan jelas. Oleh itu, persetujuan itu telah bercantum dengan penghakiman supaya kadar faedah statutori sahaja yang perlu dibayar.

Cases referred to

Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84; [1981] 3 All ER 577 (refd)
Anlaby v Praetorius (1888) 20 QBD 764 (distd)
Economic Life Assurance Society v Usborne & Ors [1902] AC 147(refd)
Fewings, Re Sneyd, ex p (1884) 25 Ch D 338 (refd)
Hong Leong Finance Ltd v Famco (S) Pte Ltd & Ors [1993] 1 SLR 348 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (folld)
MBf Finance Bhd v Malaysia Air Charter Co Sdn Bhd & Ors [1987] 2 MLJ 719 (folld)
Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165 (folld)
Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 1 MLJ 495 (refd)
Standard Chartered Bank v YB Edward Esnen & Ors [1989] 3 MLJ 115 (refd)
Supreme Finance (M) Bhd v Koo Sin Ken [1987] 1 MLJ 296 (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129 (distd)
Tengku Aishah & Ors v Wardley Ltd [1993] 1 SLR 337 (refd)
United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors [1991] 1 MLJ 55 (folld)
Wardley Ltd v Tunku Adnan [1991] 3 MLJ 366 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 16 (i)
Rules of the High Court 1980 O 42 r 12, O 19 r 7(1)

Kilat Beriak (*Chew, Jugah, Wan Ullok, Goh & Co*) for the plaintiff.
Kho Lik Kiat (*Gabriel Wong* with him) (*Chan, Kho & Loy*) for the first and third defendants.

Cur Adv Vult

Abdul Kadir Sulaiman J: By a notice of appeal dated 13 December 1993, the plaintiff appeals against the decision of the learned registrar of the High Court in setting aside judgments in default of appearance entered against the first and third defendants.

The said decision of the learned registrar was made pursuant to applications by way of summons-in-chambers, filed by the said first and third defendants. In their applications, the first and third defendants prayed for the judgments in default entered against them be set aside or, alternatively, for the interest rates stated in the said judgments to be reduced from 12.25 to 8%pa from the date of judgment until payment.

The claim, upon which the judgments were entered, was based upon a letter of guarantee dated 21 June 1984 which was executed by the first, second and third defendants as consideration for credit facilities in the form of an overdraft account and a fixed loan granted by the plaintiff to Dai Tai Enterprise Sdn Bhd. When Dai Tai Enterprise failed to service the credit facilities in the manner as agreed by the parties, letters of demand were issued to the first, second and third defendants which culminated in this claim before the court.

At the outset, it is clear that the first and third defendants are not disputing liability. This stance is also admitted by learned counsel for the defendants in their court appearances before the learned registrar in the High Court, Kuching and before me. The only bone of contention between the parties which is to be decided by the court is the rate of interest stated in the said judgments which is 12.25%pa from the date of judgment until date of payment. The first and third defendants argued that this rate is far in excess of the statutory maximum of 8%pa as provided under O 42 r 12 of the Rules of the High Court 1980 ('the RHC') and s 16(i) of the Courts of Judicature Act 1964 ('the Act'), thus rendering the judgment illegal. Order 42 r 12 provides:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

The words in brackets above were added by PU(A) 445/86. Thus, the position prior to PU(A) 445/86 was that the post judgment rate of interest must not exceed 8%pa.

However, s 16(i) of the Act has incorporated in its proviso that the interest rate can be more than 8%pa if the parties agreed that it be so:

> Rules of court may be made for the following purposes:
>
> (i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court:
>
> Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties;
> ...

Apparently, O 42 r 12 was amended to bring it in line with s 16. As Zakaria Yatim J said in *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165, s 16(i) is only an enabling provision and

A does not confer any power on the High Court regarding interest but only to the rules committee to make rules to regulate the rate of interest payable on all debts.

The plaintiff's argument before the court is simple: the parties herein have agreed that the post-judgment interest be at 12.25%pa on monthly B rests (reduced from 15.5% as stipulated in the plaintiff's letter of offer (exh A) to Goh Lee Miang's affidavit opposing the application to set aside the judgment in default).

In *Anlaby v Praetorius* (1888) 20 QBD 764, Fry LJ laid down the principle that where a plaintiff has obtained judgment illegally, the defendant C is entitled ex debito justitiae to have such judgment set aside; and the court has only power to impose terms upon him as a condition of giving him his costs. The principle was so applied by our Supreme Court in the case of *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129. However, these two cases dealt with irregular judgments in default which were entered as a result of a premature entry of judgment (*Anlaby*'s case) and a D failure to first obtain leave under O 19 r 7(1) of the RHC before entering judgment (*Syarikat Joo Seng*'s case). More in point, as submitted by learned counsel for the first and third defendants, are the following cases which dealt with illegal judgments in default as a result of interest far in excess of the statutory rate allowed under our RHC:

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(1) *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors* [1991] 1 MLJ 55;

(2) *Malayan United Bank Bhd v Mohd Salleh bin Mohd Yusoff & Ors*; and

(3) *MBf Finance Bhd v Malaysia Air Charter Co Sdn Bhd & Ors* [1987] F 2 MLJ 719.

In *United Malayan Banking Corp*'s case, the plaintiff entered judgment in default of defence with an interest rate of 15%pa until payment. The second defendant applied to set aside the said judgment on the ground that the guarantee agreement stipulated the rate of interest at 12%pa and, G although the interest was varied to 15%pa, they were not given a written notice of the variation as stipulated in the agreement. They argued that the plaintiff could not claim for more than 8%pa interest after judgment as O 42 r 12 (prior to the amendment vide PU(A) 445) did not provide for post-judgment interest in excess of 8%pa. Abu Mansor J agreed with the plaintiff's submission and held that the judgment in default of defence was H illegal because the pre-judgment interest rate should be 12%pa and the post-judgment interest should remain at 8%pa as the RHC does not allow that it be more than that.

The earlier decision of Zakaria Yatim J in *Malayan United Bank Bhd*'s case also hinges upon the same argument. As the RHC (then) did I not allow post-judgment interest of more than 8%pa, the judgment in default of appearance entered against the fourth defendant containing interest at 17.75%pa from the date of judgment until satisfaction of the same was illegal and must be set aside.

The Supreme Court in *MBf*'s case has held a similar view, that O 42 r 12 (then) could not confer upon the plaintiff the right to claim more than the 8%pa post-judgment interest rate and neither did the proviso to s 16(i) of the Courts of Judicature Act 1964. In that case, the plaintiff entered judgment in default with interest at 2% per month on the judgment from the date of judgment until actual payment. The rate of 2% per month was derived from art 18 of the equipment lease agreement entered into by the parties and this article provided that the first defendant (lessee) shall pay an additional interest of 2% per month on arrears calculated from the date the amount was due until the date of actual payment. The Supreme Court held that this interest rate was only payable so long as arrears were due or remained due under the agreement to enable the applicant (plaintiff) to sue upon it and enforce payment but once payment had been obtained, the debt merged with the judgment because the arrears were then payable under the judgment and no longer under the agreement and the plaintiff was only permitted to claim 8%pa as the post-judgment rate.

The Supreme Court laid down the principle (after consideration of three English authorities) that any agreement on the payment of interest is to be construed strictly by the courts and the onus is plainly on the party who claims interest in excess of the statutory rate of 8%pa.

For the moment, the relevance of these cases to our present case is this: that a post-judgment interest rate which is in excess of the statutory minimum is illegal and would entitle the court to set aside the judgment ex debito justitiae. Thus, if the defendants herein can prove that the plaintiff is not entitled to the 12.25% stated in the judgments, there is no discretion left to the court. The judgments must be set aside.

I would approach the issue in this case in this manner. First, whether there is an agreement between the parties to pay post-judgment interest at more than 8%pa.

Secondly, if the answer to the first question is in the affirmative, whether the agreement to pay interest in excess of the statutory rate is an independent covenant which does not merge with the judgment debt. In other words, whether the doctrine of merger applies in this case.

On the first question

It is not disputed that the letter of guarantee is silent on the rate of interest to be imposed on the fixed loan and overdraft facilities, *let alone the rate of interest to be imposed after judgment is obtained.* All the joint and several guarantee (exh B to Goh's affidavit) provides is that the first, second and third defendants 'herein jointly and severally guaranteed payment on demand of all moneys and liabilities ...' together with interest on all such debts and liabilities to the date of payment with monthly rests (whether the relation of banker and customer has ceased or not). The letter of offer (exh A), however, states the rate of interest at 15½%pa with monthly rests or such rates as 'may be prescribed by us from time to time at our absolute discretion'. Interest will be charged at a higher rate as may be fixed by the

bank from time to time, an amount exceeding the limit 'sanctioned' for the overdraft facility.

In respect of the fixed loan, interest is stated as follows: '15½%pa with yearly rests or such rates as may be prescribed by us from time to time at our absolute discretion'.

Learned counsel for the first and third defendants urged the court not to read the letter of offer into the guarantee but learned counsel for the plaintiff submitted before the court the case of *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 to support their contention that failure to state the rate of interest in the guarantee is not fatal to their claim.

In *Lee Ah Chor*'s case, Southern Bank granted an overdraft facility to a company secured by a continuing guarantee executed by the applicant and other directors of the company. A second guarantee was later executed by the other directors except the appellant. Apparently, the first guarantee failed to state the rate of interest payable and counsel for the appellant raised the point (amongst others) that the guarantee was void for uncertainty. The Supreme Court failed to agree with him and held that, notwithstanding the omission to state the rate of interest, the guarantee was still valid as the letter of offer from the bank did. Interest waas stated at 16%pa. The Supreme Court held that the guarantee must be read together with the letter of offer and Jemuri Serjan SCJ quoted, with approval, Lord Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at pp 118–119; [1981] 3 All ER 577 at p 582 when his Lordship said that the judge should not have 'construed the guarantee in its strict literal sense — all by itself — without regard to the letters which accompanied it — and without regard to the surrounding circumstances — or the factual matrix, to use the modern equivalent'.

I cannot argue with the reasoning in *Lee Ah Chor*'s case and accept learned counsel's contention that the letter of guarantee must be read together with the letter of offer. So, the upshot of this is the rate of interest on the overdraft and fixed loan guaranteed is 15.5%pa (later reduced to 12.25%).

However, the big question is, does it mean that the parties have agreed that the same interest rate applies after judgment is entered? Learned counsel for the plaintiff said yes, because the words in the guarantee states 'payment of interest whether the relation of banker and customer has ceased or not'. He relied on this phrase to persuade the court that this means that after judgment is entered and the plaintiff and defendants are no longer banker or customers but more of judgment creditor and judgment debtors, the interest rate of 12.25% still applies. I find this argument too far-fetched. In order to penalize the defendant into paying more than the statutory rate of interest after judgment, the plaintiff must so express and be certain in the words used in the agreement. As quoted earlier, the onus, said Seah SCJ in *MBf*'s case [1987] 2 MLJ 719 is plainly on the party who claims interest in excess of the statutory rate of 8%pa to satisfy the court that it is so. The agreement must be construed strictly and the provision on interest in this case is far too vague, to my mind, to incorporate an

agreement on the interest rate after judgment. Though this strict construction may be harsh on the plaintiff, the plaintiff has decided to come to court to assist him in executing the debt due to him (*MBf*'s case and *Supreme Finance (M) Bhd v Koo Sin Ken* [1987] 1 MLJ 296). For that assistance, he has to abide by the statutory rate of interest provided by the RHC.

Therefore, I conclude that there was no agreement by the parties to state what the interest rate was to be after judgment has been entered and the defendants herein are entitled as of right to set aside the judgment in default of appearance as being illegal.

Assuming I was wrong in coming to the above conclusion, I will now go on to the next question of whether the doctrine of merger applies. Both counsel have submitted a number of case authorities each to show the court instances where the doctrine was or was not applied both in England and in Malaysia.

As a start, the general principle on the doctrine of merger is stated (in *ex p Fewings, Re Sneyd* (1884) 25 Ch D 338 per Fry LJ at p 355) thus:

> When there is a covenant for the payment of a principal sum and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. *Of course, a covenant to pay interest may be so expressed as not to merge in a judgment for the principal*; for instance if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment. (Emphasis added.)

The above view was endorsed and shared by the House of Lords in *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147 and in our Malaysian court such as the case of *Supreme Finance* and the Singapore Court of Appeal case of *Tengku Aishah & Ors v Wardley Ltd* [1993] 1 SLR 337. Selvam JC, in another case of *Wardley Ltd v Tunku Adnan* [1991] 3 MLJ 366 at p 368, had even diligently distilled three propositions of law from *ex p Fewings* and *Economic Life Assurance Society*. These three propositions are:

(1) Where a contract provides for the repayment of 'principal sum with interest', the right to interest will merge in the judgment together with the claim for the principal sum.

(2) Where a contract or a subsequent agreement expresses the right to repayment of the principal interest as independent rights, there will be no merger of the interest claim into the judgment for the principal sum.

(3) Where a security document entitles the creditor to retain his security until he is paid the full amount of his principal and interest, the right to full interest will not be affected by any merger of the interest covenant into a judgment against the debtor. In other words, full interest is recoverable in an action to realize the security (foreclosure) or the freeing of security (redemption).

From a reading of these cases, it is clear that whether the doctrine of merger applies or not depends very much upon the contruction of the covenant on interest. To quote Lord Davey in *Economic Life*'s case (at p 153), 'it was a mere question of the construction of the instrument ...'. A true construction of the covenant would reveal whether the covenant falls under proposition (1) or (2) of *Wardley*'s case.

In our present case, there was not very much to construe. Like the words emphasized in the quotation taken from Fry LJ's judgment, the covenant to pay interest may be so expressed as not to merge in a judgment. I cannot, by any stretch of imagination, apply to the words in the guarantee herein any covenant to pay *post-judgment interest* at the same rate of 15.5% as stated in the letter of offer. The words in *both* the letter of offer and guarantee are too general in nature. Contrast the way the interest provision is worded in this case with that in *Wardley*'s case where the interest provision, said Selvam JC, was expressed as an independent term which would survive any judgment for the principal debt and it read '*as well after as before judgment*'. This, he construed, meant that the covenant to pay interest is independent of the judgment itself.

Another example would be *Tengku Aishah*'s case. Clause 11.4 in the agreement between the parties clearly detailed that the interest '*as well after as before judgment*' be at the rate of 4½% above the rate as determined by the bank. It was held, by the Supreme Court, that this cl 11.4 was intended to be an independent contract and was not incidental or ancillary to the covenant to repay the principal sum together with interest.

Yet another example is the case of *Standard Chartered Bank v YB Edward Esnen & Ors* [1989] 3 MLJ 117, where the interest clause held the words 'as well after as before any judgment at the rate ... demand by the bank until payment'. This was construed, by Haidar J, as an independent covenant that does not merge with the judgment.

There are other cases cited by plaintiff's counsel to support their contention that the covenant to pay interest herein is an independent covenant. The first is the case of *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495. Although in this case the words 'after as well as before judgment' or words to that effect were not used, nonetheless the intention of the parties was made clear by the words that the interest is 'from the date due until *payment is made in full* by the lessee with such interest' (emphasis added). This, Edgar Joseph Jr SCJ said, constituted an independent covenant to pay interest.

The other is the Singapore case of *Hong Leong Finance Ltd v Famco (S) Pte Ltd & Ors* [1993] 1 SLR 348 where the same conclusion as in *Public Finance*'s case was reached in view of the clarity of the interest clause which stated the rate of interest as being 16%pa 'from the due date until payment is made'.

In our case, and to start with, there is no separate clause on interest. It appeared in the opening paragraph of cl 1, where the defendants agreed to pay all money and liabilities ... together with interest 'on all such debts and liabilities to the date of payment with monthly rests (whether the relation of banker and customer has ceased or not)'. To my mind, the inevitable conclusion after construing this clause in its entirety, is that the plaintiff has not phrased its interest clause with sufficient clarity as to afford a meaning that it is an independent covenant to pay interest above the statutory rate of 8%pa. So, it merges with the judgment.

As quoted by Selvam JC in *Wardley*'s case, *The Encyclopedia of Forms & Precedents* (4th Ed) at p 40 note 80 states that it is common practice in mortgages to provide that interest shall be payable at the specified rate as well after as before any judgment. I would add that if the parties choose not to be clear in their phraseology, then the plaintiff must suffer the peril of attaching the statutory rate of interest to their period after the judgment until full payment is recovered.

In the premises, I hold that the judgments in default of appearance obtained against the first and third defendants are irregular judgments and, accordingly, the appeal is dismissed and the decision of the learned registrar is affirmed. Costs here and before the learned registrar to the first and third defendants

Appeal dismissed.

Reported by Sarojah Arianayagam